General Principles of law in the Field of International Investment Law

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General Principles of Law in the Field of Foreign Investment

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I. INTRODUCTION

The essay discusses the nature and functions of general principles of law in the field of foreign investment. It is undisputed that 'general principles have acquired a role in the shaping of rules in the area of foreign investment protection'[1] and played 'a prominent role in arbitrations between States and foreign nationals'[2].

The essay is divided in three parts. First, it discusses general principles from the standpoint of public international law and Article 38 (1) (c) of the Statute of the International Court of Justice (ICJ) (Sections II-III). Although related to the law applicable by the ICJ in settling disputes between States, Article 38 (1) (c) provides important indications that are pervasive of all fields of international law including foreign investment law. Yet, the term 'international law' for the purpose of Article 42 of ICSID Convention, governing the applicable law, must be understood 'in the sense given to it by Article 38 (1) (c) [...] allowance being made for the fact that Article 38 was designated to apply to inter-State disputes'[3].

The essay then focuses on general principles of law in the field of investment law, bearing in mind that in this context they apply primarily to the legal relationship between States and investors (Sections IV-V). An attempt is made to draw some light on the controversial yet challenging question of the adequacy of international law and domestic law to govern foreign investment and the alleged necessity of a third legal system.

Finally, the conclusions reached in the second part will be tested through the discussion of some of the most prominent general principles of law resorted to for the purpose of interpreting and applying the fair and equitable treatment standard (Section VI).

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[1] M. Sornarajah, *The International Law of Foreign Investment*, 2nd ed. (Cambridge: CUP, 2004), p.94.

[2] C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: CUP, 2001), p. 614.

[3] *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, para 41. In *Enron Corp. Ponderosa Assets L.P. v. Argentina*, ICSID ARB/01/3, Award, 22 May 2007, para 257, the tribunal referred to the general principles of law – as understood under Article 38(1)(c) of the ICJ Statute – as "able to guide and 'discipline' the evaluation of state conduct under investment treaty standards" (footnote omitted).

II. General principles of law in Article 38 (1) (c) of the Statute of the International Court of Justice

State practice and international decisions on general principles of law under Article 38 (1) (c) of the Statute of the International Court of Justice remain scarce[4], although the ideological tension that characterised the debate on these principles in the past has largely faded away[5]. It is now accepted that Article 38 (1) (c) was intended to prevent the risk of *non liquet* through the application by the Court of the general principles of law recognized in *foro domestico* by the generality of States[6].

These principles are applied within the jurisdiction of States with regard to the relationships amongst private entities – natural or legal persons – and/or between them and public entities. They may be susceptible of application to inter-States relationships, bearing in mind that 'conditions in the international field are sometimes very different from what are in the domestic, and that rules which this latter's conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level'[7].

The verb to transpose is borrowed – and adapted – from linear algebra. It is intended to convey the idea that general principles developed in national legal systems are imported into the international legal order. As a result, general principles of law coexist both in the domestic legal systems of the generality of States *and* in international law[8]. The operation is by no means a creature of Article 38 (1) (c). Quite the contrary, '[historically there can be no question as to the importance of the general principles of law – especially of Roman law – in the formation of international law'[9].

[4] H. Thirlway, 'The Sources of International Law', in M. Evans (ed.), International Law, 2nd ed. (Oxford: OUP, 2006), p. 113, at p. 129, observes a '[s]triking lack of evidence in international practice and jurisprudence of claims to a specific right of a concrete nature being asserted or upheld on the basis simply of a general principle of law'. On general principles, see in particular: B. Cheng, *General Principles of Law, as Applied by International Tribunals and Courts* (London: Stevens, 1953); A. McNair, 'The General Principles of Law Recognized by Civilized Nations', 33 *BYIL* (1957) 1; M. Sørensen, 'Les principes généraux de droit reconnus par les nations civilisées', 101 *RdC* (1960-III) 1, Chapter I; G. Schwarzenberger, *The Inductive Approach to International Law* (London: Stevens, 1965); J.G. Lammers, 'General Principles of Law Recognized by Civilized Nations', in Kalshoven et al. (eds.), *Essays on the Development of the International Legal Order* (Alpeen aan Rijn: Sijhoff, 1990), p. 53; R. Kolb, *La bonne foi en droit international. Contribution à l'étude des principes généraux de droit international public* (Paris: Presse Universitaire de France, 2000).

[5] On the position of Soviet writers, see in particular, G.I. Tunkin, *Theory in International Law* (London: Allen & Unwin, 1974), pp. 190 ff.

[6] For W. Friedman, *The Changing Structure of International Law* (London: Stevens, 1964), p. 196, these principles must be 'sufficiently widely and firmly recognized in the leading legal systems of the world'. See also A. Pellet, 'Article 38', in A. Zimmermann *et al.* (eds.). *The Statute of the International Court of Justice. A Commentary* (Oxford: OUP, 2006) p. 677, pp. 764 ff. See also H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989. Suppl., 2005', 76 *BYIL* (2005) 1.

[7] G. Fitzmaurice, sep. op. in *Barcelona Traction*, below n. 36, p. 40, at p. 66. See also H. Waldock, 'General Course on Public International Law', 106 *RdC* (1962-II) 1, p. 54.

[8] In *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para 158, for instance, the Appellate Body of the World Trade Organisation described the principle of good faith as being, at once, a general principle of law and a general principle of international law.

[9] H. Waldock, above n. 7, p. 54. Among the many examples of international decisions prior to the establishment of the Permanent Court of International Justice, he mentions the *Williams case*, decided in 1885, in Moore, *International Arbitration*, vol. IV, p. 4190-1.

This is an important and continuous form of interaction between domestic law and international law, regardless to the monism – dualism debate[10]. The monism – dualism debate ultimately revolves around the relationship between international law and *a specific* domestic legal system. The legal effects of international rules within the jurisdiction of a specific state depend on the relevant constitutional or other legal provisions in force in that State. This implies the possibility for each State of treating differently customs and treaties[11] and of changing its relevant constitutional or other legal provisions at any time.

The general principles of law relate to the interaction between international law and the *generality* of national legal systems. International law is thus influenced and exposed to the general principles that have emerged and developed within the jurisdiction of the generality of States. To the extent they are applicable between subjects of international law, general principles of law represent a reservoir in which governments as well as national and international tribunals may extract, respectively, in their mutual relationships and in the settlement of disputes.

General principles of law derived from municipal system interact with the other sources of international law too. They may develop into customary rules[12], find their way into treaties, or fill the gaps of both treaties and customs[13]. Treaty rules, customary international rules and general principles of law are by no means mutually exclusive categories.

For the purpose of this essay, there is no need to go beyond a brief mention to the category of general principles of international law that may develop at the international level independently from the national legal experiences. What characterises these principles is their general character[14]. When they are sufficiently complete to be susceptible of application by an international tribunal, they can be assimilated for all practical purposes to customary international rules[15].

[10] On the dispute between monism and dualism, see G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 *RdC* (1957-II) 1, p. 70 ff.

[11] This is indeed the case of several States, see for instance the United Kingdom.

[12] According to H. Waldock, above n. 7, p. 62, 'there will always be a tendency for a general principle of national law recognized in international law to crystallize into customary law'.

[13] In *George Pinson Case, 5 RIAA* (1928) 422, it was held that 'every international convention must be deemed tacitly to refer to general principles of international law for all questions which does not itself resolve in express terms and in a different way'.

[14] See G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (Alpheen aan Rijn: Sijthoff & Noordhoff, 1979), p. 66; I. Sinclair, 'The Significance of the Friendly Relations Declaration', in C. Warbrick, V. Lowe (eds.), *The United Nations and the Principles of International Law* (New York: Routledge, 1994), p. 1.

[15] I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: OUP, 2003), p. 18, warns about the 'inappropriateness of rigid categorization of the sources'. See also the Report of the ILA Committee on the Formation of Customary (General) International Law, London, 2000, p. 10-11, available at http://www.ila-hq.org/html/layout_committee.htm; M. Mendelson, 'The International Court of Justice and the Sources of International Law', in V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (Cambridge: CUP, 1996), p. 63, at p. 80. Commenting Article 21 of the International Criminal Court Statute, A. Pellet, 'Applicable Law', in A. Cassese, J. Jones (eds.), *Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002), p. 1051, at p. 1073, observes that 'principles of international law are customary norms covered by Article 38 (b) of the Statute of the International Court of Justice, whereas general principles of law are a 'third source' covered by section (c) of the above provision'.

Yet, both the Permanent Court of Justice and the ICJ have paid little attention to the distinction between principles and rules. In the *Chorzów case*, the former held that

> [i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation[16].

In the Gulf of Maine case, the ICJ concluded that

> the association of the terms "rules" and "principles" is no more than the use of a dual expression to convey one and the same idea, since in this context "principles" clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term "principles" may be justified because of their more general and more fundamental character[17].

III. NATURE AND FUNCTIONS OF GENERAL PRINCIPLES OF LAW IN PUBLIC INTERNATIONAL LAW

Whereas a full inquiry on the general principles of law recognized in *foro domestico* is clearly beyond the purpose of this study, it is appropriate to briefly discuss the nature and functions of these principles. General principles of law 'lie at the very foundation of the [international] legal system and are indispensable to its operation'[18]. They are a heterogeneous category. The *pacta sunt servanda* rule or principle must be singled out for its unique character. It is the inherent postulate of any legal system. It was neither possible nor necessary to prove its existence at the genesis of the international legal order. Historically, it is part of the legacy of Roman law. In the passage from *jus gentium* to *ius inter gentes*, the *pacta sunt servanda* principle was immediately transposed from the Digest to the newly emerged legal order[19].

This is an antecedent general principle of law. It has been noted that

> [t]his rule does not require to be accounted for in terms of any other rule. It could neither not be, nor be other than what it is. It is not dependent on consent, for it would exist without it. There *could* not be a rule that *pacta sunt non-servanda*, or *non sunt servanda*, for then the *pacta* would no longer be *pacta*. Nor could there be a rule that *pacta sunt interdum servanda* et *interdum non sunt servanda*. The ides of *servanda* is inherent and necessary in the term *pacta*[20].

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[16] *Chorzów Factory*, Merits, Germany v. Poland, P.C.I.J. Series A, No, 17 (1928), p. 29.

[17] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, para. 79. See also para 113. As observed by H. Waldock, above n. 7, p. 63, the Court has treated customary law and general principles of law as 'a single corpus of law'.

[18] B. Cheng, above n. 4, p. 390.

[19] A. Miele, *La Comunità Internazionale*, 3rd ed. (Torino: Giappichelli, 2000), p. 88-89, emphasising how much Grotius relied on the Digest and the relevant fragments by Ulpian in particular.

[20] G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', *in Symbolae Verzijl* (The Hague: Nijhoff, 1958), p. 153, p. 158. As pointed out by H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961), p. 219-220 (italics original), '[f]or, in order that words, spoken or written, should in certain circumstances function as a promise, agreement, or treaty, and so give rise to obligations and confer rights which others may claim, *rules* must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do. Such rules presupposed in the very notion of a self-imposed obligation obviously cannot derive *their* obligatory status from a self-imposed obligation to obey them'. See also R. Kolb, above n. 4, p. 75.

It has further been observed, in the context of an investment-related arbitration, that '[n]o international jurisdiction whatsoever has ever had the least doubt as to the existence, in international law, of the rule *pacta sunt servanda*'[21].

The existence of general principles of law must be established through a comparative study of national legal systems representative of the whole international community[22]. This is not a mechanical exercise[23], but one which requires a process of abstraction and generalization[24] and also some adaptation to the needs of the international legal order[25]. In this perspective, 'private law rules only serve as indications of principles and not as rigid injunctions in the international domain'[26]. It must be further emphasised that

> [i]t is not the concrete manifestations of a principle in different national systems – which are anyhow likely to be vary – but the general concept of law underlying them that the international judge is entitled to apply under paragraph (c) [of Article 38 (1) of the ICJ Statute][27].

These principles may evolve in time and new ones may emerge within the jurisdiction of the generality of States in order to meet the need of society. When applicable to the relationship between States, they can be transposed into international law and function as a vehicle of its development[28].

General principles of law clearly have a subsidiary character in respect of treaties and customs. Article 38 (1) of the ICJ Statute establishes no formal hierarchy of sources.

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[21] *Texaco v. Libya,* Award, 19 January 1977, 53 *ILR* (1979) 420, p. 462.

[22] As observed by M. Virally, 'The Sources of International Law', in M. Sørensen, *Manual of International Law* (London: Macmillan, 1968), p. 116, at p. 147, 'the existence of non-existence of common principles is a question of fact to be solved by examination rather than *a priori* opinion'. See also M. Akehurst, 'Equity and General Principles of Law', 25 *ICLQ* (1976) 801, p. 818; R.B. Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations, 51 *AJIL* (1957) 734.

[23] In the separate opinion in *International Status of South West Africa,* Advisory Opinion, *I.C.J. Reports 1950,* p. 146, at p. 148, A. McNair observed that '[t]he way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules'.

[24] See G. Schwarzenberger, above n. 4, p. 50; C. De Visscher, *Théorie et réalité en droit international,* 4th ed. (Paris: Pedone, 1970), p. 419.

[25] P. Weil, 'Principes généraux du droit et contrats d'Etat', in *Le droit des relations économiques internationales,* Etudes offertes à B. Goldman (Paris: Librairies Techniques, 1982), p. 387, p. 402-3. In 'Le droit international en quête de son identité', 237 *RdC* (1992-VI) 9, p. 145, the same author further maintained that '[l]es principes généraux de droit ne sont le fruit ni d'une addition des droits internes ni d'une sorte de moyenne des solutions consacrées par eux; pas davantage ne se définissent-ils comme leur dénominateur commun. Transcendant les particularités techniques propres à chaque système national, ils répresentent la quintessence, l'âme en quelque sorte, de l'ensemble des droits nationaux par-delà leur diversité'.

[26] G. Fitzmaurice, above n. 7, p. 66. The judge insisted that 'when private law concepts are utilized, or private law institutions are dealt with in the international legal field, they should not there be distorted or handled in a manner not in conformity with their true character, as exists under the system or systems of their creation', footnote 4 at p. 67-68.

[27] H. Waldock, above n. 7, p. 65, quoting with approval A. McNair, *South West Africa case, I.C.J. Reports 1950,* p. 148.

[28] See, in particular, W. Jenks, *The Proper Law of International Organizations* (London: Stevens, 1962), p. 259-60; W. Friedman, 'The Uses of "General Principles" in the Development of International Law', 57 *AJIL* (1963) 279.

It rather introduces the order in which they shall be applied in accordance with the *lex specialis* principle[29]. They perform a multitude of – often overlapping – functions[30].

First, it has been argued that they can be a source of rights and obligations. The *Amco* Tribunal, in particular, observed that 'full compensation of prejudice, by awarding to the injured party the *damnum emergens* and *lucrum cessans* is a principle common to the main system of municipal law, and therefore, a general principle of law which can be considered as sources of international law'[31]. Although certainly plausible, the argument that general principles of law may be a source of rights and obligations – when their content is suitable for that purpose – has little practical value since it is not only extremely difficult but also unnecessary to distinguish them from customary rules[32].

Second, they may be taken into account in order to interpret a treaty, as envisaged in Article 31 (3) (c) of the Vienna Convention on the Law of Treaties[33], or express the rationale for a treaty or customary rule. From this second perspective, it has been observed that '[a] rule answers the question *what:* a principle in effect answers the question *why*'[34]. In *Reparation for Injury,* for instance, the ICJ made a reference to the principles underlying the rule of nationality of claims[35].

Third, general principles of law may also complete treaty or customary rules and fill their gaps. In *Barcelona Traction,* the ICJ held that due to the lack of institutions in international law it had to resort to 'rules generally accepted by municipal legal systems'[36]. In the *Chorzów Case,* the PCIJ stated that

> '[restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law'[37].

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[29] *Case Concerning the Right of Passage over Indian Territory,* Merits, *I.C.J. Reports 1960,* p. 6, at p.43.

[30] According to B. Cheng, above n. 4, p. 390, general principles of law fulfil three different functions: '[f]irst, they constitute the source of various rules of law, which are merely expression of these principles. Secondly, they form the guiding principles of the juridical order according to which the interpretation and application of the rules of law are oriented. Thirdly, they apply directly to the facts of the case wherever there is no formulated rule governing the matter'. For a more sophisticated approach, see R. Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)', 53 *NILR* (2006) 1, p. 25 ff.

[31] *Amco Asian Corporation and Others v. Indonesia,* ICSID ARB/81/1, Award of November 20, 1984, 89 *ILR* (1992) 405, p. 504.

[32] For R.C.A. White, 'Expropriation of the Libyan Oil Concessions. Two Conflicting International Arbitrations', 30 *ICLQ* (1981) 1, p. 9, '[i]t is thus extraordinarily difficult to isolate the general principles of law as defined in Article 38 (1) (c) from rules of customary international law under Article 38 (1) (b) where general principles have become operational in consequence of State practice'.

[33] 1155 U.N.T.S. 331. See C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *ICLQ* (2005) 279.

[34] G. Fitzmaurice, above n. 7, p. 7. According to R. Kolb, 'General Principles of Procedural Law, in A. Zimmermann *et al.* (eds.), above n. 6, p. 794, they are 'general normative propositions considered to be expressive of the ratio of a series of more detailed norms'.

[35] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, *I.C.J. Reports 1949,* p. 182.

[36] *Barcelona Traction, Light and Power Company, Limited,* Judgment, *I.C.J. Reports 1970,* p. 3, p. 37.

[37] *Chorzów Case,* above n. 16, p. 47.

Fourth, they are crucial with regard to compliance with obligations imposed by, and the exercise of rights protected by customary or convention rules. A prominent position in this regard is occupied by the principle of good faith. *Pacta sunt servanda* and good faith are two intimately related[38] and yet distinct principles. The first postulates the binding force of obligations stemming from treaties; the second governs compliance with these obligations. As observed by the ICJ, the principle of good faith is 'one of the basic principles governing the creation and performance of legal obligations, whatever their source'[39]. The Court further pointed out that the principle 'is not in itself a source of obligation where none would otherwise exist'[40]. The good faith principle has its roots in Roman law and its application to international law has never been objected[41].

Finally, general principles of law permit the functioning of the dispute settlement mechanisms in international law[42]. These procedural principles include the principles of *kompetenz-kompetenz,* due process, burden of proof, *res judicata,* estoppel, and equality of parties.

IV. GENERAL PRINCIPLES OF LAW IN THE FIELD OF FOREIGN INVESTMENT LAW

General principles of law recognized by States within their own jurisdiction play an important role in the field of foreign investment not only with regard to the relationship between States, but also – if not especially – in respect of the relationship between the host State and the foreign investor[43]. Indeed, the latter relationship represents a fertile ground for the application of the general principles of law considering that normally these principles have emerged in the domestic legal system with regard to relationships in which at least one party is a natural or legal person.

The following definition of general principles was provided in *Liamco v. Libya:*

> [g]eneral principles are usually embodied in most recognized legal systems, and particularly in Libyan legislation, including its modern codes and Islamic law. They are applied by municipal courts and are mainly referred to in international and arbitral case-law. They,

[38] As demonstrated by Article 26 of the VCLT. In *Nuclear Tests* (Australia v. France) Judgment, *I.C.J. Reports 1974,* p. 253, para 46; *Nuclear Tests* (New Zealand v. France) Judgment, *I.C.J. Reports 1974,* p. 457, para 49, the Court held that 'the very rule of *pacta sunt servanda* in the law of treaties is based on good faith'. For the ILC, 17 *YBILC* (1966-II) Part 2, p. 211, 'good faith is itself a legal principle and forms an integral part of the *pacta sunt servanda* principle'.

[39] *Nuclear Tests* (Australia v. France) Judgment, *I.C.J. Reports 1974,* p. 253, para 46; *Nuclear Tests* (New Zealand v. France) Judgment, *I.C.J. Reports 1974,* p. 457, para 49.

[40] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), *I.C.J. Reports 1988,* p. 68, at p. 105, para 94.

[41] In *North Atlantic Fisheries Case,* 1910, 1 H.C.R., p. 143, at p. 167, for instance, the Permanent Court of Arbitration held that '[e]very State has to execute the obligation incurred by treaty bona fide'. In *Anglo-Norwegian Fisheries Case,* Judgment, *I.C.J. Reports 1951,* p. 116, at p. 142, the ICJ stressed that '[t]he principle of good faith requires that every right be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law'.

[42] See R. Kolb, above n. 34, p. 793.

[43] C. Schreuer, 'International and Domestic Law in Investment Disputes. The Case of ICSID', 1 *Austrian Rev. Int. Eur. Law* (1996) 89, p. 107, observes that '[since] treaties and custom are created through the interaction of States, general principles of law are particularly useful in areas of law that involve non-State actors such as investment relationships'. See also N. Wühler, 'Application of General Principles', in ICCA Congress Series n. 7 (1996), p. 553.

thus, form a compendium of legal precepts and maxims, universally accepted in theory and practice'[44].

Apart from rare exceptions, such as *Klöckner v. Cameroon*[45], investment tribunals have refrained from engaging in theoretical distinctions between rules and principles or between customary international law and general principles of law. Instead, they have opted for a more pragmatic approach[46]. With regard to reparation, for instance, they have commonly referred to the *Chorzów case* as expressing the principles[47] or the principles of international law[48] governing the standard of compensation in case of expropriation.

In *Santa Elena v. Costa Rica,* in particular, the Tribunal used the terms "rules" and "principles" as interchangeable terms and declared itself satisfied that

> the rules and principles of Costa Rican law which it must take into account, relating to the appraisal and valuation of expropriated property, are generally consistent with the accepted principles of public international law on the same subject. To the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail[49].

In *Nykomb v. Latvia,* the Tribunal held that

> the question of remedies to compensate for losses or damages caused by the Respondent's violation of its obligations under Article 10 of the Treaty must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in the International Law Commission's Draft Articles on State Responsibility 2001[50].

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[44] *Liamco v. Libya,* Award, 12 April 1971, 62 *ILR* (1982) 145, p. 175. The law applicable to the dispute was indicated in Clause 28, para 7 of the Concession Agreement, which read: 'This concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunal'. According to *Texaco v. Libya,* above n. 21, p. 452, however, 'the expression "principles of international law" is of much wider scope than "general principles of law", because the latter contribute with other elements (international custom and practice which is accepted by the law of nations) to constitute what is called the "principles of international law"'. Here the Tribunal seems to understand the expression 'principles of international law' in Clause 28 (7) as composed of two elements, namely customary law and general principles of law, and to hold that if the former were inconsistent with the principles of Libyan law, then only general principles of law should be applied.

[45] *Klöckner Industrie-Anlagen GmbH and others v. Cameroon,* ICSID ARB/81/2, Decision on Annulment, 3 May 1985, 114 *ILR* (1999) 243, p. 269 ff.

[46] See, for instance, *Lauder v. Czech Republic,* UNCITRAL, Award, 3 September 2001, paras 205 ff. As pointed out by G. Hanessian, 'General Principles' of Law in the Iran – U.S Claims Tribunal', 27 *CJTL* (1988-9) 309, p. 323, the Iran – United States Claims Tribunals 'frequently refers simply to 'general principles of international law' as the basis of its decision, leaving doubt as to whether the Tribunal is referring to customary law or 'general principles of law recognized by civilized nations'.

[47] See, for instance, *Metalclad Corporation v. Mexico,* ICSID ARB(AF)/97/1 (NAFTA), Award, 30 August 2000, para 122.

[48] See, for instance, *Biloune and Marine Drive Complex Ltd v. Ghana Investment Center and Government of Ghana,* Award on Damages and Costs, UNCITRAL, Award on Damages and Costs, 30 June 1990, in 95 *ILR* (1994) 183, p. 228.

[49] *Compañia del Desarrollo de Santa Elena S.A. v. Costa Rica,* ICSID ARB/96/1, Final Award, 17 February 2000, para 64.

[50] *Nykomb Synergetics Technology Holding AB v. Latvia,* Stockholm Rules (Energy Charter Treaty), Award, 16 December 2003, p. 38,

Yet, investment arbitral tribunals have frequently applied general principles of law. This occurred, for instance, in respect of the principles of good faith[51], res judicata[52], kompetenz-kompetenz[53], claimant has the burden of proof[54], unjust enrichment[55], that parties cannot take legal advantage of its own fault[56], and *exceptio non adimplenti contractus*[57].

Bearing in mind that these principles must be approached as a question of method of decision-making rather than a list[58] and that they are exposed to a process of continuous evolution, no attempt is made – nor is it necessary for the purpose of this essay – to identify the general principles of law applied by investment tribunals. Suffice it to recall that not differently from the case of inter States disputes, the existence and content of these principles must be established on the basis of a comparative inquiry of the main legal systems[59].

In *Klöckner v. Cameroon,* the *ad hoc* committee criticised the Tribunal for failing to support with sufficient evidence the finding on the existence of a general principle of law allegedly imposing a duty to full disclosure to a partner in a contract[60]. It held that

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[51] See, for instance, *Técnicas Medioambientales Tecmed, S.A. v. Mexico,* ICSID ARE (AF)/00/2, Award, 29 May 2003, para 153; *Canfor Corporation v. United States, Terminal Forest Products Ltd. v. United States* (Consolidated NAFTA / UNCITRAL), Preliminary Question, 6 June 2006, para 182; *Sempra Energy International v. Argentina,* ICSID ARB/02/16, Award, 28 September 2007, para 297. See also the UN General Assembly Resolution 1803 (XVII) of 14 December 1962, para 8.

[52] In *Waste Management v. Mexico* (II), ICSID ARB(AF)/00/3, Jurisdiction, 26 June 2002, paras 39 and 43, the Tribunal held that "There is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice. Indeed both parties accepted this". See also *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Peru,* ICSID ARB/03/4 (Previously *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Peru*), Decision on Annulment, 5 September 2007, para 86.

[53] See, in particular, *Sociedad Anónima Eduardo Vieira v. Chile,* ICSID ARB/04/7, Award, 21 August 2007, para 203.

[54] In *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan,* ICSID ARB/02/13, Award, 31 January 2006, para. 70, the Tribunal held that '[i]t is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim'. See also *Asian Agricultural Products Limited v. Sri Lanka,* ICSID ARB/87/3, Award, 27 June 1990, 30 ILM (1991) 603, para 56; *Autopista Concesionada de Venezuela, C.A. v. Venezuela,* ICSID ARB/00/5, Award, 23 September 2003, para 110; *International Thunderbird Gaming Corporation v. Mexico,* UNCITRAL (NAFTA), Award, 26 January 2006, para 95.

[55] In *Sea-Land Services Inc v. Iran,* 6 Iran US Cl. Trib. Rep. (1984) 149, p. 168, the Tribunal held that '[t]he concept of unjust enrichment had its origins in Roman law [...] It is codified or judicially recognized in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the category of general principles of law available to be applied by international tribunals'. More recently, in *Saluka Investments BV (The Netherlands) v. Czech Republic,* UNCITRAL, Partial Award, 17 March 2006, para 449, the Tribunal pointed out that '[t]he concept of unjust enrichment is recognised as a general principle of international law. It gives one party a right of restitution of anything of value that has been taken or received by the other party without a legal justification'.

[56] See, for instance, *Sempra Energy International v. Argentina,* ICSID ARB/02/16, Award, 28 September 2007, para 353.

[57] *Klöckner Industrie-Anlagen GmbH and others v. Cameroon,* ICSID ARB/81/2, Award, 21 October 1983, 114 *ILR* (1999) 157; *Sapphire Int Petroleum Lta v. National Iranian Oil Co.,* Award, 15 March 1963, 35 *ILR* (1967) 136, pp. 182-184,

[58] M. Akehurst, *A Modern Introduction to International Law,* 6th ed, (London: Unwin, 1987), p. 34. This view is shared, in the context of international commercial arbitration, by E. Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?', 17 *AI* (2001) 59, p. 62 ff.

[59] As observed by C. Schreuer, above n. 43, p. 108, '[b]efore applying general principles of law, great care must be taken to establish these principles by inductive proof and not simply to assume or postulate their existence'. As held in *Feldman v. Mexico,* ICSID ARB(AF)/99/1 (NAFTA), Award on Merits, 16 December 2002, para 58, a general principle cannot exist unless it is uniformly applied by the generality of States.

[60] *Klöckner v. Cameroon,* above n. 57, Decision on Annulment, 3 May 1985, 114 *ILR* (1999) 243.

the Tribunal manifestly exceeded its powers by merely referring to the existence of such a principle in French law and qualifying it as a general principle of law without any examination of other States practices.

General principles of law are included in the applicable law of several multilateral treaties. The reference to 'such rules of international law as may be applicable' in Article 42 (1) ICSID Convention, in particular, is to be read as including all sources referred to in Article 38 (1) of the ICJ Statute. This is entirely consistent with the rules on interpretation contained in the Vienna Convention on the Law of Treaties[61] and is supported by the Report of the Executive Directors[62]. The same can be said of the 'applicable rules of international law' for the purpose of Article 1131 (1) NAFTA, as recently admitted in *Methanex v. United States*[63], and of the 'applicable rules and principles of international law' for the purpose of Article 26 (6) European Charter Treaty.

Bilateral investment treaties do not often contain a clause on the applicable law. When they do, they frequently indicate international law – normally in combination with domestic law – by using a variety of expressions including 'principles of international law'[64], 'rules and principles of international law'[65], 'generally recognized rules and principles of international law'[66], 'generally acknowledged rules and principles of international law'[67], 'general principles of international law'[68], 'general principles of international law, or 'such general rules of law as the tribunal deems applicable'[69]. It is submitted that all these expressions are inclusive of the general principles of law in the sense of Article 38 (1) (c) of the ICJ Statute.

Furthermore, general principles of law are particularly appropriate to govern the legal relationship created by State contracts. Writing in 1957, McNair predicted that general principles of law 'will prove fruitful in the application and interpretation of [State] contracts which, though not interstate contracts and therefore not governed by public international law *strictu sensu*, can more effectively be regulated by general principles of law than the special rules of any single territorial system'[70]. The reference

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61 1155 UNTS 331.

62 Above n. 3. See also: I. Shihata, A. Parra, 'Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention', 9 *ICSID Review – FILJ* (1994) 183, p. 193-4; C. Schreuer, above n. 2, p. 608 ff.; E. Gaillard, Y. Banifatemi, The Meaning of "and" in Article 42 (1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process', 18 *ICSID Review – FILJ* (2003) 375, p. 384; C, Leben, 'La théorie du contrat d'Etat et l'évolution du droit international des investissements', 302 *RdC* (2003) 197, p. 294.

63 *Methanex Corp. v. United States,* UNCITRAL (NAFTA), Final Award, 3 August 2005, Part II, Ch. B, para 3.

64 See, for instance, Article 9 (7) BIT Argentina – Jamaica; Article 10 (4) BIT Peru – Argentina; Article 8 (4) United Kingdom – Argentina; Article 8 (7) BIT Italy – Argentina; Article X (4) BIT Canada – Argentina.

65 See, for instance, Article 17(1) United Kingdom – Mexico.

66 See, for instance, Article 13 (5) BIT Netherlands – Bolivia.

67 See, for instance, Article 18 (6) BIT Mexico – Greece.

68 See, for instance, Article 9 (5) BIT Netherlands – Venezuela; Article 10 (5) BIT Argentina – Germany.

69 See, for instance, Article 10 (7) BIT Netherlands – Czech and Slovak Republic.

70 A. McNair, above n. 4, p. 15.

to international law in State contracts has to be construed as containing the general principles of law[71]. More than that, general principles of law can even be considered *ipso facto* as applicable law to these contracts[72].

In inter State disputes, general principles of law have traditionally been associated with private law[73]. However, nothing prevents transposing general principles of public law into international law. Quite the contrary, principle of public law may play an important role in defining legal relationship between the host State and foreign investors. It has been observed that

> [t]he science of international law can no longer be content with the analogous application of private law categories. It must search the entire body of the "general principles of law recognized by the civilized nations" for proper analogies. With the growing importance of international legal relations between public authorities and private legal subjects, public law will be an increasingly fertile source of international law[74].

It has been argued that the application of general principles of law in inter States disputes must respect the pattern of relationships. With regard to the attempt made by the applicants in the *South West Africa Cases* to convince the ICJ of the existence of a general principle of law prohibiting discrimination, an author concludes that 'the international equivalent of a municipal [principle] of non discrimination would be [a] norm forbidding between subjects of international law, i.e. States, not a norm forbidding States from discriminating between individuals'[75]. Without discussing the merit of this argument in disputes between States, it is submitted that the pattern of relationship is normally respected in the field of transnational investment. Yet, most of the general principles of private law may apply to the relationships between a State acting as a merchant and foreign investors, whereas the general principles of public law may apply when the State exercises public powers over foreign individuals or company within its jurisdiction.

V. NATURE OF GENERAL PRINCIPLES OF LAW IN THE FIELD OF TRANSNATIONAL INVESTMENT

The nature of general principles of law in the field of transnational investment has prompted a formidable debate in literature in which general principles of law are often

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[71] See the excerpt from an unpublished award rendered in 2000 by the Arbitration Committee of the Geneva Chamber of Commerce, reproduced in C. Leben, above n. 62, p. 296.

[72] G. Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Milano: Giuffrè, 1972), p. 262. Writing in 1957, A. McNair, above n. 4, p. 10, maintained that in State contract, 'the parties, if they specify no particular legal system, intend that their contracts should be governed by the general principles of law recognized by civilized nations'.

[73] H. Lauterpacht, 'Private Law Sources and Analogies of International Law' (Cambridge: CUP, 1927), p. 7, maintained that 'general principles of law are for the most practical purposes identical to general principles of private law'. According to R. Jennings, A. Watts, *Oppenheim's International Law,* 9th ed. (London: Longman, 1992), 36-37, '[t]he intention is to authorise the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States'. See also above notes 23 and 26.

[74] W. Friedman, above n. 6, p. 295. See also G. Sacerdoti, above n. 72, footnote 75, p. 262-3.

[75] H. Thirlway, above n. 4, p. 111.

associated or used interchangeably with transnational law or *lex mercatoria*[76]. The debate has been heavily influenced by the evolution of international commercial arbitration[77] and suffers from some terminological incertitude[78]. Without any pretension to discuss even summarily the different views put forward in literature, it is appropriate for the purpose of this essay to briefly examine the most challenging question which characterises such debate, namely the emergence of a new body of law distinct from both domestic and international law.

The need for a third legal system composed of transnational rules was considered as necessary to govern legal relationships – and particularly those created by State contracts – for which neither domestic nor international law would have been adequate[79]. From this perspective, transnational rules would allow to overcome the 'false dilemma between domestic and international law'[80] since domestic law can hardly function as proper law whereas resorting to international law would imply treating the investor as a subject of international law or applying international law to its relationship with the host State[81]. The remarkable assertion made in 1962 that 'a new body of law, differing from both international and municipal law, [was] in the process of developing', however, was mitigated by the admission that 'transnational law is founded on the general principles of law common to civilised nations'[82].

In spite of the formidable intellectual exercise, transnational rules intended as rules belonging to a third legal system have hardly had any significant impact on investment arbitration. The leading case remains the arbitration between *Kuwait* and *Aminoil*[83]. Under Article III (2) of the Arbitration Agreement the Tribunal had to determine the law governing the substantive issues 'having regard to the quality of the Parties, the

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[76] E. Gaillard, 'Use of General principles of International Law in International Long-Term Contracts', *27 Int'l Business Law* (1999) 214, p. 215, observes that 'the terms "general principles of international law" and "transnational rules" are preferred [...] to "lex mercatoria" because they imply that the solution to the problems of the business community may be found in national legal systems'. According to G. Delaume, 'The Proper Law of State Contracts and the *Lex Mercatoria:* A Reapprisal', 3 *ICSID Review* (1988) 79, p. 106, '*Lex Mercatoria* [...] remains, both in scope and in practical significance, an elusive system and a mythical view of a transnational law of State Contract whose sources are elsewhere'. See also K. Highet, 'The Enigma of the *Lex Mercatoria'*, 63 *Tulane Law Rev.* (1988-9) 613. According to M. Sornarajah, *The Settlement of Foreign Investment Disputes* (The Hague: Kluwer, 2000), p. 258, '[t]he category of transnational law depends to a large extent on general principles of law'.

[77] Amongst the classic works on *lex mercatoria,* see B. Goldman, 'La *Lex Mercatoria* dans les contrats d'arbitrage internationaux: Réalité et Perspectives', 106 *Journ. droit international* (1979) 475; M.J. Mustill, 'The New *Lex Mercatoria'*, The First Twenty-five Years', 4 *Arb. International* (1997) 86; E. Gaillard, above n. 58; L.Y. Fortier, 'The New, New *Lex Mercatoria,* or Back to the Future', 17 *Arb. Intl.* (2001) 121.

[78] E. Gaillard, Thirty Years of *Lex Mercatoria:* Towards the Selective Application of Transnational Rules', 10 *ICSID Review* (1995) 208, p. 210, notes that 'the terminology *lex mercatoria* is ambiguous. In contrast with the notions of transnational rules or general principles of international commercial law, the notion of *lex mercatoria* emphasizes the content of the rules rather than the way in which such rules come about'. See also E. Gaillard, J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer, 1999), § 1446.

[79] In this regards, P. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) can be considered as the seminal work.

[80] J-F Lalive, 'Contracts between a State or a State Agency and a Foreign Company', 13 *ICLQ* (1964) 987, p. 1007.

[81] *Ibidem.*

[82] A.A. Fatouros, *Government Guarantee to Foreign Investors* (New York: Columbia University Press, 1962), p. 283 and p. 289. For a critique, see A. Drucker, *Book Review,* 13 *ICLQ* (1964) 309.

[83] *Kuwait and American Independent Oil Company (AMINOIL),* Final Award, 24 March 1982, 21 *Int. Legal Materials* (1982) 976.

transnational character of their relations and the principles of law and practice prevailing in the modern world'. The Tribunal applied the law of Kuwait, of which international law – including the general principles of law – formed an integral part. For the Tribunal,

> by referring to the transnational character of relations with the concessionaire, and to the general principles of law, this Article brings out the wealth and fertility of the set of legal rules that the Tribunal is called upon to apply[84].

The Tribunal comfortably settled the dispute by resorting to domestic and international law and emphasised the interaction between the two legal systems[85]. The task was certainly facilitated by the reference to 'the principles of law and practice prevailing in the modern world' contained in Article III (2) and the status of international law in the law of Kuwait. The importance of the award must nonetheless be stressed. It has been pointed out that

> [i]n selecting the two traditional sources of law, the Aminoil tribunal may seem to have retreated from the progress made toward the recognition of a third source – a transnational customary law in the making (*lex mercatoria*). The award achieves, however, a most significant contribution to the development of a separate body of rules governing state contracts. Instead of relying on a third legal system, the award relies on the combining of the traditional "different sources of the law thus to be applied" and by "taking advantage of their resources". The general principles of law being part of international law, they are one of "the different legal elements involved"[86].

There is therefore no need to depart from the notion of general principles of law as envisaged in Article 38 (1) (c) of the ICJ Statute. In the field of foreign investment, as in public international law, the principles commonly resorted to within the jurisdiction of the generality of States may be transposed into international law and as such be applied by investment arbitral tribunals. This does not imply recognizing the investor as a subject of international law, which was one of the main arguments for the creation of a third legal system[87]. Hence, general principles of law are the expression of the intense interaction between national and international law. Rather than bringing about the formation of a third legal order, they play a significant role in the process of internationalisation and delocalisation of investment law[88].

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[84] Para 9.

[85] In para. 10, the Tribunal further observed that '[I]f the different legal elements involved do not always and everywhere blend as successfully as in the present case, it is nevertheless on taking advantage of their resources, and encouraging their trend towards unification, that the future of a truly international economic order in the investment field will depend'.

[86] P-Y Tschanz, 'The contribution of the Aminoil Award to the Law of State Contracts', 18 *Int. Lawyer* (1984) 245, p. 262-3. For A. Redfern, 'The Arbitration between the Government of Kuwait and Aminoil', 55 *BYIL* (1985) 65, p. 89, the Tribunal suggested that 'transnational law could be regarded as equivalent to the general principles of law'.

[87] See above, text note 81. The qualification of investors as participants – which follows the functional approach adopted by R. Higgins, *Problems & Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) p. 50 – permits to overcome the doctrinal and anachronistic dichotomy between subjects and objects of international law. This position has been endorsed also in international arbitration law, see A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Sweet & Maxwell, 2004), p. 119-120, where the authors have abandoned the position defended in the 3rd edition (1999), p. 103-104.

[88] According to P. Weil, 'The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois', 15 *ICSID Review* (2000) 401, '[w]hether the application of international law is based on the will of the parties or the constitutional system of the host State, or whether one considers it to be a reflection of reality, the actual outcome is the same: the legal relationship arising out of an investment and the law governing the relationship are matters within the international legal order'.

VI. GENERAL PRINCIPLES OF LAW IN THE INTERPRETATION AND APPLICATION OF THE FAIR AND EQUITABLE TREATMENT

The fair and equitable treatment (FET) standard – arguably the most important standard in investment disputes[89] – is the perfect laboratory for the general principles of law. Virtually all investment-related international treaties impose upon the host State the obligation to ensure foreign investors FET[90]. However, they hardy provide any indications as to the precise meaning of the standard[91]. It is not surprising that investment tribunals have admitted that the standard is flexible and must be applied on a case-by-case basis taking into account all relevant circumstances of each case[92].

Tribunals have tried to give some substance to the standard by resorting to general principles of law[93]. These principles, which are often intimately related and interact with each other, govern the exercise by the host State's rights and prerogatives in its dealing with foreign investors, including admission, concessions, tax treatment, regulatory powers and expropriation[94].

As recently pointed out by a tribunal

> [t]he fair and equitable treatment standard encompasses *inter alia* the following concrete principles: the State must act in a transparent manner; the State is obliged to act in good faith; the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations[95].

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89 C. Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', 6 *Jour. World Investment & Trade* (2005) 33.

90 State practice and *opinio juris* militate in favour of the development of a customary rule on FET standard and confirm the intense interaction between the sources of international law. For a full discussion, see I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: OUP, 2008), p. 54 ff. The author also discusses FET standard itself as a general principle of law, p. 85 ff.

91 R. Dolzer, M. Stevens, *Bilateral Investment Treaties* (The Hague: Nijhoff, 1995), p. 58. J. Kalicki, S. Medeiros, 'Fair, Equitable and Ambiguous: What Is Fair and Equitable Treatment in International Investment Law?', 22 *ICSID Review/FILJ* (2007) 24. See also R. Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties', 39 *Int. Lawyer* (2005) 87; P. Muchlinski, "Caveat Investor?' The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard', 55 *ICLQ (2007)* 527.

92 See, in particular: *Waste Management Inc. v. Mexico,* ICSID ARB(AF)/00/3, 30 April 2004, para 99. In *Mondev International Ltd v. United States,* ICSID ARB/99/2, Award, 11 October 2002, paras 118, for instance, the Tribunal held that '[a] judgment of what is fair and equitable cannot be reached in abstract; it must depend on the facts of a particular case'.

93 C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration* (Oxford: OUP, 2007), para 7.176, note that '[t]he key terms ['fair and equitable treatment' and 'full protection and security'] are expressive of 'general principles of law common to civilized nations' within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice'. See also R. Dolzer, C. Schreuer, *Principles of International Investment Law* (Oxford: OUP, 2008), p. 119 ff.

94 In *Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras 266-270, the Tribunal emphasised that only acts of *puissance publique* (i.e. activities going beyond that of ordinary contracting parties) may amount to violation of the FET standard contained in the BIT between Italy and Pakistan.

95 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan,* ICSID ARB/05/16, Award, 29 July 2008, para 609.

In the first place, as pointed out in *Sempra v. Argentina,* the principle of good faith is at the heart of the concept of fair and equitable treatment[96]. Good faith is a pervasive and multifaceted principle[97] susceptible of application to every international legal relationship[98]. The importance of the principle of good faith in defining FET, however, should not be overestimated as the former is hardly more concrete than the latter[99]. Acting in good faith, at any rate, may not be enough since FET standard is an objective requirement, independent from the deliberate intention or bad faith of the host State, although such intention or bad faith may be taken into account and may aggravate the position of the host State[100].

The principle of good faith is then integrated by that of legitimate expectations[101]. In *Tecmed v. Mexico,* the Tribunal considered the FET standard

> in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations[102].

The finding, which has been quoted with approval by several tribunals[103], emphasises the need to protect the legitimate expectation of the private investor in its dealing with the host State. Intimately related to the principle of good faith[104], the

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[96] *Sempra Energy International v. Argentina,* ICSID ARB/02/16, Award, 28 September 2007, para 298. In the previous paragraph, the Tribunal held that '[t]he principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes'. See also *Tecmed v. Mexico,* above n. 51, para 153.

[97] See R. Kolb, above n. 30.

[98] The UN International Law Commission has noted that '[t]he motive of good faith applies throughout international relations', 17 *YBILC* (1966-II) Part 2, p. 211.

[99] As noted by C. Schreuer, above n. 89, p. 383.

[100] See, in particular, *CMS Gas Transmission Company v. Argentina,* ICSID ARB/01/8, Award, 12 May 2005, para 280. In *Mondev International Ltd. v. United States,* ICSID ARB(AF)/99/2, Award, 11 October 2002, para 116, the Tribunal held that 'a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith'. In *Loewen Group, Inc. and Raymond L. Loewen v. United States,* ICSID ARB(AF)/98/3), Award, 26 June 2003, para. 132, it was confirmed that 'Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice'. See also *Enron v Argentina,* above n. 3, para 263.

[101] See Wälde, Separate Opinion in *International Thunderbird v. Mexico,* above n. 54, esp. paras 27 ff. For a discussion on the emergence of legitimate expectations as a general principle of law, see E. Snodgrass, 'Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle', 21 *ICSID Review – FILJ* (2006) 1. See also S. Fietta, 'The 'Legitimate Expectations' Principle under Article 1105 NAFTA. *International Thunderbird Gaming Corporation v. Mexico',* 7 *JWI&T* (2006) 423.

[102] *Tecmed v. Mexico,* above n. 51, para 154.

[103] See, in particular, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile,* ICSID ARB/01/7, Award, 25 May 2004, paras 114-115; *OEPC v. Ecuador,* above n. 112, para 185; *CMS v. Argentina,* above n. 100, para 279; *Eureko B. V. v. Poland,* Partial Award and Dissenting Opinion, 19 August 2005, para 235. As observed in *Saluka v. Czech Republic,* above n. 55, para 302, the standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard'.

[104] Already in 1983, the Tribunal in *Amco v. Indonesia,* above n. 31, Award on Jurisdiction, 25 September 1983, p. 359, p. 385, held that 'any convention [...] should be construed in good faith, that is to say by taking into account the consequence of their commitments the parties may be considered as having reasonably and legitimately envisaged'.

principle of legitimate expectations has been borrowed from domestic administrative law[105]. Emerged within the generality of domestic legal systems for the purpose of protecting natural and legal persons subjected to the authority of public bodies, the principle is susceptible to concur in the definition of the content of FET.

The principle can be said to be common to the generality of States and transposable into a general principle of law in the sense of Article 38 (1) (c) of the ICJ Statute. Its application is fully justified by the fact that the 'two parties in investment disputes are not in an equal position'[106]. Thus the principle performs in investment law the same important function it performs domestically[107].

Other general principles of law contribute to the definition of the FET standard, although they can hardly be reduced to precise statements of rules[108]. They include due process[109], non-discrimination, proportionality[110], transparency[111], stability[112] and freedom from coercion and harassment[113].

VII. CONCLUDING REMARKS

General principles of law, intended as the principles commonly recognized and applied in *foro domestico,* play a significant role in the field of foreign investment. As foreign investment law is essentially concerned with the legal relationship between a sovereign government and a private investor, not only the general principles developed in private law but also – if not especially – those emerged in public law are applicable.

General principles of law perform in investment law the same functions they do in public international law and most prominently they may inspire the interpretation of

105 M. Sornarajah, above n. 1, p. 341.

106 T. Wälde, separate opinion in *International Thunderbird v. Mexico,* above n. 54, para 33. The author further maintained that 'over the last years a significant growth in the role and scope of the legitimate expectation principle, from an earlier function as a subsidiary interpretative principle to reinforce a particular interpretative approach chosen, to its current role as a self-standing subcategory and independent basis for a claim under the "fair and equitable standard" as under Art. 1105 of the NAFTA'.

107 In *Southern Pacific Properties (Middle East) Limited v. Egypt,* ICSID ARB/84/3, Jurisdiction, 27 November 1985, Award, 20 May 1992, 32 *ILM* (1993) 933, paras. 82-83, the tribunal held that "certain acts of Egyptian officials" [...] were "cloaked with the mantle of government authority and communicated as such to foreign investors who relied on them in making their investment. Whether legal [...] or not these acts created expectations protected by established principles of international law".

108 In *Saluka v. Czech Republic,* above n. 55, para 282, the Tribunal held that 'Article 3.1 of the Treaty requires the signatory governments to treat investments of investors of the other Contracting Party according to the standards of "fairness" and "equity" and to avoid impairment of such investments by measures which are not in compliance with the standards of "reasonableness" and "non-discrimination". It is common ground that such general standards represent principles that cannot be reduced to precise statements of rules'.

109 *Waste Management Inc. v. Mexico,* above n. 92, para 98.

110 *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile,* ICSID ARB/01/7, Award, 25 May 2004, para 109, relying on an opinion by Judge S. Schwebel.

111 *Metalclad v. Mexico,* above n. 47, para 76. In literature, see C. Schreuer, above n. 89.

112 *Occidental Exploration and Production Company v. Ecuador,* LCIA Case UN3467, Final Award, 1 July 2004, para 183.

113 In *Saluka v. Czech Republic,* above n. 55, para 308, the Tribunal explained that 'it transpires from arbitral practice that, according to the "fair and equitable treatment" standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities'.

treaty provisions, concur to define their content and fill their gaps. This is particularly evident in the case of the FET standard. Indeed, investment tribunals have been resorting to a number of general principles of law in order to make operational the typically vague – but not necessarily identical – FET standard provision contained in virtually all BITs.

The importance of general principles, however, goes well beyond the settlement of specific disputes. On the one hand, general principles of law contribute to increase the coherence and uniformity – within the limits imposed by the text of the relevant instruments – of the rules and standards governing foreign investment. On the other hand, they ensure a dynamic interpretation and application of foreign investment law in harmony with the evolution of law and society within national legal systems. Both ways are manifestations of the intense and continuous interaction between international law and national legal systems.